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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 61

E. S. EVANS, *et al.*,

Petitioners,

—v.—

CHARLES E. NEWTON, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONERS

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
CHARLES STEPHEN RALSTON
FRANK H. HEFFRON
10 Columbus Circle
New York, New York 10019

DONALD L. HOLLOWELL
WILLIAM H. ALEXANDER
HOWARD MOORE, JR.
859½ Hunter Street, N.W.
Atlanta, Georgia 30314

Attorneys for Petitioners

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Opinion Below

The opinion of the Supreme Court of Georgia (R. 81) is reported at 220 Ga. 280, 138 S. E. 2d 573.

Jurisdiction

Judgment of the Supreme Court of Georgia was entered on September 28, 1964 (R. 81). Rehearing was denied October 8, 1964 (R. 92). On December 22, 1964, Mr. Justice Stewart extended the time for filing the petition for writ of certiorari to and including March 5, 1965. The petition for writ of certiorari was filed March 5, 1965, and granted April 26, 1965 (R. 93-94).

The jurisdiction of this court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below

and asserting here denial of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Where (a) Georgia's Legislature expressly authorized the establishment of racially restricted public parks through testamentary charitable trusts;

(b) following creation of such a park and continuous ownership and management by the City of Macon and its agents, city officials took all necessary steps to place the park in private hands for the express purpose of continuing operation of the park on a segregated basis;

(c) the courts of Georgia enforced the will provision directing exclusion of Negroes in preference to a conflicting provision directing perpetual ownership by the city;

(d) the park established by charitable trust is in all respects a public facility and part of the public life of the community; and

(e) the charitable trust is endowed by the state with judicial administration, tax exemption, perpetual existence, and tort immunity:

can the substitution of private trustees to operate the park for white persons only be reconciled with the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following statutes of the State of Georgia:

Ga. Code §69-504 (1933) (Acts, 1905, p. 117):

Gifts for public parks or pleasure grounds.—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

Ga. Code §69-505 (1933) (Acts, 1905, pp. 117, 118):

Municipality authorized to accept.—Any municipal corporation, or other persons natural or artificial, as trustees, to whom such devise, gift, or grant is made, may accept the same in behalf of and for the benefit of the class of persons named in the conveyance, and for their exclusive use and enjoyment; with the right to the municipality or trustees to improve, embellish, and ornament the land so granted as a public park, or for other public use as herein specified, and every municipal corporation to which such conveyance shall be made shall have power, by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive used (sic) and enjoyment thereof.

Statement

The will of Augustus Octavius Bacon, a United States senator from Georgia, executed March 28, 1911 (R. 10-28), provided for a gift of real property to the City of Macon as owner and trustee to maintain a public park for the white women and children of the City of Macon.[1] A Board of Managers appointed by the mayor and council (R. 19) was to operate the park. The will set aside a separate fund in trust to defray expenses of administering the park (R. 20). The park, named Baconsfield, was operated in accordance with the racial limitation in Bacon's will until the spring of 1963, when Negroes began using it (R. 8, 33). Shortly thereafter, the present suit was instituted by some of the respondents to enforce the racial limitation and to exclude Negroes again from the park.

May 4, 1963, Charles E. Newton and other members of the Board of Managers of Baconsfield filed a petition in the Superior Court of Bibb County, Georgia, requesting removal of the City of Macon as trustee, appointment of new trustees, and transfer of title in Baconsfield to the new trustees. Named as defendants were the City of Macon and the trustees of certain residuary legatees of Bacon's estate, the Curry heirs. Plaintiffs sought expressly to enforce the racially discriminatory terms of Bacon's will (R. 5-10).

The Ctiy of Macon answered (R. 32) admitting most allegations of the petition, but claiming "no authority to enforce racially discriminatory restrictions with regard to property held in fee simple or as trustees for a private or public trust and, as a matter of law, [being] prohibited

[1] The Board of Managers was given discretion to open the park to white men and white non-residents of Macon (R. 20), and this power was exercised (R. 7-8).

from enforcing such racially discriminatory restrictions" (R. 33). Defendant trustees for the Curry heirs answered admitting all allegations of the petition and joining in "each and every prayer of said petition" (R. 34-35); these defendants were represented by the same counsel as plaintiff members of the Board of Managers (R. 10, 35). Plaintiffs then filed a motion for summary judgment (R. 35).

May 29, 1963, petitioners here, Rev. E. S. Evans and five other Negro citizens of Macon, moved to intervene. For the first time a diversity of interest appeared in the lawsuit (R. 36). The intervenors alleged that to appoint new trustees to comply with the racial limitation in Bacon's will would violate the Fourteenth Amendment (R. 40). They requested that the Superior Court "effectuate the general charitable purpose of the testator to establish and endow a public park within the City of Macon by refusing to appoint private persons as trustees" (R. 41).

January 8, 1964, plaintiff members of the Board of Managers amended their original petition, requesting that all Negroes be enjoined from using the park (R. 42-43). The amendment also requested that four previously unrepresented residuary legatees under Bacon's will, the Sparks heirs (R. 44), be added as plaintiffs and that the trustees of the Curry heirs, originally joined as defendants, be permitted to assert the Curry heirs' interests as plaintiffs (R. 44). Simultaneously, the Sparks heirs intervened, asking that all relief requested by the original plaintiffs be granted (R. 45-46). At the same time, the trustees for the Curry heirs concurred in asking to be allowed to assert their interests as plaintiffs, and joined in all of plaintiffs' prayers for relief (R. 47-48). The Sparks heirs and the trustees for the Curry heirs, all of whom were represented by counsel for the plaintiff board members, asked for reversion of the trust property into Bacon's estate if other relief were denied (R. 47, 49).

February 5, 1964, the City of Macon, the only defendant making any pretense of defending the suit, amended its answer to state that it had resigned as trustee of Baconsfield (R. 50) pursuant to resolution of the mayor and council on February 4, 1964 (R. 51-61), and requesting the court's acceptance of its resignation and the appointment of substitute trustees (R. 50-51).

On May 5, 1964, the Negro intervenors amended their petition, alleging that the Fourteenth Amendment would be violated if the relief sought by the other parties were granted (R. 62-63). Intervenors asked the court to "withhold approval of the attempted resignation of the City of Macon as trustee under the will of A. O. Bacon, [and] direct the City of Macon to continue to fulfill this paramount constitutional obligation to administer the park on a racially non-discriminatory basis . . ." (R. 63).

No evidentiary hearing was held. The Superior Court issued its decree[2] March 10, 1964, allowing intervention

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[2] The Superior Court also issued a letter opinion, reprinted in the Petition for Writ of Certiorari, pp. 11a-12a, which was as follows:

> After careful consideration of the Motion for Summary Judgment in the above stated case, I have reached the following conclusions:
>
> The racial limitation in Senator A. O. Bacon's will is not unlawful for any reason as contended by the intervenors, Reverend E. S. Evans, et al.
>
> The inability of the City of Macon, as Trustee, to apply constitutionally the racial criterion prescribed by the testator for use of the property as a park for white women and white children affected the trustee and not the trust, and the City having tendered its resignation as trustee, it is proper that the Court accept the resignation and appoint private trustees who can carry out the purpose and intent of the testator as set forth in the will.
>
> It is my opinion that the doctrine of Cy Pres cannot be applied to Baconsfield. There is no general charitable purpose expressed in the will. It is clear that the testator sought to benefit a certain group of people, i.e., "the white women, white girls, white boys and white children of the City of Macon", and it is clear that he sought to benefit them only in a certain way, i.e., by providing them with a park or playground. Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating

by all who requested it, accepting the resignation of the City of Macon as trustee of Baconsfield, appointing three private individuals as new trustees, and retaining jurisdiction (R. 64-65). No ruling was made on the requests that Negroes be enjoined from using the park. The conditional prayers for reversion of the trust property were held moot (R. 65).

Negro intervenors, petitioners here, appealed to the Supreme Court of Georgia. On September 28, 1964, the Supreme Court of Georgia affirmed the judgment of the Superior Court of Bibb County (R. 81, 89). A motion for rehearing was denied on October 8, 1964 (R. 92).

Summary of Argument

Before Senator Bacon wrote his will creating Baconsfield for white persons only, Georgia enacted Ga. Code §69-504, expressly authorizing gifts of land to public or private trustees for the establishment of racially restricted public parks. The natural tendency of the statute was to encourage if not to force testators to specify segregation, and under the principles announced in *Peterson* v. *Greenville,* 373 U. S. 244 and *Robinson* v. *Florida,* 378 U. S. 153, the testator's personal preference for segregation, if any, must be disregarded. By placing its authority behind discriminatory classification based solely on color, the state denies equal protection of the laws. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 726, 727 (concurring and dissenting opinions).

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that this limitation was an essential and indispensable part of his plan for Baconsfield.

The Court has, therefore, this day signed and filed with the Clerk of this Court an order and decree, a copy of which is herewith enclosed.

The actions of the Board of Managers of Baconsfield and the Mayor and Council of the City of Macon represent a glaring illustration of state action to enforce segregation. As owner and trustee, the city through the board operated Baconsfield for white persons in violation of *Pennsylvania* v. *Board of City Trusts,* 353 U. S. 230. In 1963, when Negroes went on the property, rather than treat the racial limitation as absolutely void, the city and board went to court to enforce it. This contravened *Shelley* v. *Kraemer,* 334 U. S. 1, and Bacon's stated intent that the city retain perpetual control. By submitting its resignation, the city transferred public property to private persons for the invidious purpose of assuring continued segregation.

Georgia's courts violated the Fourteenth Amendment by enforcing the racial limitation in Bacon's will. *Shelley* v. *Kraemer, supra.* Under *Pennsylvania* v. *Board of City Trusts, supra,* that limitation was null and void, but the courts below gave it effect although it was in direct conflict with another provision of Bacon's will directing perpetual ownership by the city. In doing so, the courts acted in defiance of the Constitution which forbids a state to implement segregation.

As a public facility operated for the benefit of the community, Baconsfield cannot be restricted to white persons under the Fourteenth Amendment. Like the company town in *Marsh* v. *Alabama,* 326 U. S. 501, Baconsfield, even if owned by private trustees, is similar in all respects to facilities owned and operated by the state. Like the hospitals in *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (4th Cir. 1963) cert. denied 376 U. S. 938 and *Eaton* v. *Grubbs,* 329 F. 2d 710 (4th Cir. 1964), Baconsfield fulfills an essential public function that might otherwise have to be performed by the state. Moreover,

Baconsfield is so much a part of the public life of the community that whether owned by public or private interests, exclusion of one race is inconsistent with the Fourteenth Amendment.

As a charitable trust given significant state protection in the form of judicial administration, tax exemption, perpetual existence and tort immunity, Baconsfield must be subjected to special scrutiny before being permitted to exclude Negroes. While all charitable trusts are similarly favored the court need not decide whether all arbitrary discriminations are forbidden in all such trusts. But when a charitable trust receiving these advantages has been created pursuant to a state policy of segregation, has been operated by the state on a segregated basis, has been turned over to private control to continue segregation, and has created a facility of an inherently public nature, that trust cannot be allowed to perpetrate the very type of arbitrary discrimination proscribed by the Fourteenth Amendment.

ARGUMENT

I.

A Park Established by Testamentary Trust, in Conformity With a Statute Authorizing and Encouraging Racial Restrictions, Cannot Exclude Negroes as a Class.

The Bibb County Superior Court accepted the City of Macon's resignation and appointed private trustees, believing they could enforce the racial restriction in Bacon's will forbidden to the city by the Constitution. Finding the racial limitation "essential and indispensable," (*supra* p. 7) the court approved the change in trustees as the way to preserve the limitation without violating the Con-

stitution. The court's conclusion that private trustees could do what the city might not does not stand the test of examination. The state's encouragement and sanctioning of segregated parks through passage of Ga. Code §69-504 invalidates enforcement of the racial restriction whether Baconsfield is operated by public or private trustees. Cf. *Robinson* v. *Florida*, 378 U. S. 153.

In 1905 Georgia's Legislature enacted what is now Ga. Code §69-504 (Acts 1905, p. 117), authorizing the conveyance of land to be "dedicated in perpetuity to public use as a park, pleasure ground, or other public purpose . . ." The conveyance could be by "devise, gift, or grant," in fee simple to a municipal corporation or in trust to a municipal corporation or other persons. The statute expressly authorized limitation of use of conveyed property "to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only." A companion statute empowered municipalities to accept such gifts and "by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive use and enjoyment thereof." Ga. Code §69-505 (Acts 1905, pp. 117-18).

In 1911 Senator Augustus Octavius Bacon followed the provisions of §69-504, providing in his will a gift of land to the City of Macon

> in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, . . . (R. 19).

The similarity between the statute and the will leaves no doubt that Senator Bacon was seeking to assure perpetual enforcement of the trust by strict compliance with every aspect of §69-504. Bacon was taking no chances that there might be a failure of the trust. The close connection between Georgia's statute and Senator Bacon's carefully drawn will defeats any possible argument that Baconsfield is the product of purely private action. As in *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 463, "the crucial factor is the interplay of governmental and private action."

It is argued that §69-504 had nothing to do with Bacon's decision to limit use of the park to one race, and Bacon's will did express his view that "in their social relations with two races . . . should be forever separate" (R. 21). But the statute obviously encouraged racial restrictions and strongly implied that a trust for unrestricted parks would not be upheld. In 1911 there was no judicial construction of the act, and nothing in the statute itself indicated it was permissive rather than mandatory. The statute was passed at a time when Georgia was requiring segregation in many other areas.[3] Its companion statute expressly authorized use of the police power to enforce racial limitations in municipal parks, Ga. Acts 1905, pp. 117-18, now Ga. Code §69-505. Certainly, §69-504's listing of six types of authorized racial limitations, considered in light of the maxim *inclusio unius est exclusio alterius,* was an awesome portent that Georgia would not tolerate unsegregated parks.

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[3] E.g., Ga. Acts 1870, p. 398 (segregation on railroads and other common carriers); Ga. Acts 1887, p. 68, and Acts 1889, p. 124 (school segregation); Ga. Acts 1890-91, Vol. I, p. 114 (segregation in state university); Ga. Acts 1894, pp. 115, 117 and Acts 1908, p. 58 (segregation of names on voting lists); Ga. Acts 1894, p. 31 and Acts 1874, p. 109 (segregated tax returns); Ga. Acts 1897, pp. 71, 73 and Acts 1890-91, p. 213 (segregation of prisoners).

The significance of §69-504 is best understood when considered against the background of prior Georgia law. As respondents concede, Georgia had long enforced charitable trusts, see *Jones* v. *Habersham*, 107 U. S. 179, and municipalities had been authorized to act as trustees of such trusts in 1892. Ga. Acts 1892, p. 104, now Ga. Code, §69-502. There were thus only a limited number of possible reasons for enactment of §69-504: to make it plain that creation of a park was a valid charitable purpose, to require that parks established under charitable trusts be restricted to one race, or to encourage racial restrictions by making it clear that segregated parks would be acceptable. It is unlikely that §69-504 was passed merely to validate parks as charitable trusts. An old Georgia law, now Code §108-203, defining charitable purposes does not expressly mention public parks, but no previous Georgia cases had refused to recognize them as charitable, and courts in several other states had accepted them.[4] However, it was far from clear that a park restricted to one race would be considered charitable. Traditionally, only trusts for educational or religious purposes, or for aid of the poor, could be limited to a restricted class; trusts for other, or "community benefit," purposes would not be recognized unless their facilities were open to all members of the community. See 4 Scott, Trusts, p. 2715, §375.2 (2d ed. 1956). See also id., p. 2650 (§371) and p. 2660 (§371.6). Section 69-504 turned the law of trusts upside down, creating serious doubts that trusts for parks open to the whole community would be enforced, and establishing that racially restricted parks were acceptable to the state. Whether the racial provision of §69-504 is viewed as manda-

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[4] *Cresson's Appeal*, 30 Pa. 437 (1858); *Lackland* v. *Walker*, 151 Mo. 210, 52 S. W. 414 (1899); *Burbank* v. *Burbank*, 152 Mass. 254, 25 N. E. 427 (1890); *cf. Lester* v. *Jackson*, 69 Miss. 887, 11 So. 114 (1892).

tory or permissive, Georgia's legislature obviously served the cause of segregation by enacting it.

Whatever the construction eventually placed upon it, §69-504 could only encourage testators to encumber their charitable trusts with racial restrictions. Thus Georgia shares with Senator Bacon the responsibility for exclusion of Negroes from Baconsfield. When segregation by private persons is required by statute or ordinance, *Peterson* v. *Greenville,* 373 U. S. 244, 248; or executive command, *Lombard* v. *Louisiana,* 373 U. S. 267; or encouraged[5] by administrative regulation, *Robinson* v. *Florida,* 378 U. S. 153, private motivation is overshadowed by the state's intervention. See also *Parrot* v. *Tallahassee,* 381 U. S. 129; *Fox* v. *North Carolina,* 378 U. S. 587; *Williams* v. *North Carolina,* 378 U. S. 548.

The state's encouragement of private discrimination is much more effective here than in *Robinson,* where the state required racially separate restrooms if both races were served or employed. A private decision to integrate a restaurant could easily be effectuated in Florida by installing separate restroom facilities, if indeed the restaurant did not already have them for Negro employees. But there was no way for a testator in Georgia to be assured that his trust would be upheld if he did not direct the exclusion of one race from the park.

Support for petitioners' position can be also found in the views expressed by several members of this Court in *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715. Justice Stewart, concurring, 365 U. S. at 726, read the decision below as construing a Delaware statute to au-

[5] In other contexts, this Court has proscribed encouragement of discrimination by the state. *Anderson* v. *Martin,* 375 U. S. 399; *Barrows* v. *Jackson,* 346 U. S. 249, 254. See also *Gantt* v. *Clemson Agricultural College,* 320 F. 2d 611, 613 (4th Cir. 1963).

thorize "discriminatory classification based exclusively on color," and thus "clearly violative of the Fourteenth Amendment." 365 U. S. at 727. Justices Frankfurter, Harlan, and Whittaker could not accept the premise but agreed with the conclusion. 365 U. S. at 727, 728. As Justice Frankfurter wrote, "For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws." 365 U. S. at 727 (dissenting opinion). Here, certainly, is a statute authorizing discriminatory classification based exclusively on color and thus violative of the Constitution.[6]

It has been noted above that §69-504 authorized gifts to private trustees, as well as municipalities, for establishment of public parks. Had Bacon given his land to private trustees rather than the city it is just as clear that the racial limitation, inspired and sanctioned by the state, could not be enforced. Thus, contrary to the reasoning of respondents and the courts below, the transfer of Baconsfield from public to private trustees had no effect whatever on the enforceability of the racial clause in Bacon's will, and to effect that transfer was erroneous. Petitioners, who resisted that transfer in the courts below, complain not only because the court's action was erroneous, but also because it was injurious to them and all Negroes in Macon. The Superior Court transferred ownership in Baconsfield from the city, which had acknowledged an inability to enforce the limitation, to private trustees whose very existence is dependent upon an understanding—albeit erroneous—that they could exclude Negroes with impunity.

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[6] In *Burton*, the dissenting justices thought Delaware's statute might be merely declaratory of the common law which allowed a restaurant to exclude any person for any reason. In this case the statute is not ambiguous. It speaks in terms of white and colored. Delaware's statute made no reference to race, nor did its Supreme Court in stating the common law.

II.

City Officials Are Directly Responsible for Exclusion of Negroes From Baconsfield.

This lawsuit is a superb example of concerted action by state officials to enforce segregation. Compliance with Senator Bacon's racial restriction by the City of Macon as owner and trustee, and by the city-appointed Board of Managers, was precluded by the decision in *Pennsylvania* v. *Board of Directors of City Trusts,* 353 U. S. 230. But rather than comply with the Constitution and treat the racial restriction as *pro non scripto,* just as segregation statutes are dead letters today, city officials devised means of warding off Negro use of the park.

First, the Board of Managers of Baconsfield petitioned the Superior Court to replace the city as trustee. Its case was bottomed on the racial language of Bacon's will; no reason was offered except that the city was not limiting the park to white persons. The ultimate power of appointing board members resided with the city. Thus, a state agency was petitioning a court to effect a change in a charitable trust to exclude Negroes from a place of public recreation.

The defendant City of Macon could find no reason to object to its displacement. Its answer merely admitted the petition's allegations and apologized for the city's constitutional disability to eject Negroes. Raising no defenses, the city placidly acquiesced in divestment of its title to the property and its power to appoint members of the Board of Managers, despite Senator Bacon's stern injunction that the property was "under no circumstances, or by any au-

thority whatsoever, to be sold or alienated or disposed of. . . ." (R. 19). Apparently, the city decided not to assert the defense that transfer of its property to discriminate racially would violate the Fourteenth Amendment.

Following Negro petitioners' intervention, the city adopted another stance and submitted its resignation to the court. In its resolution authorizing the resignation, the city offered as its principal reason that the city deemed "it to be in the public interest that Baconsfield be operated and maintained for the benefit of the public rather than for private benefit or profit" and without the city's withdrawal "the property may revert" to Bacon's heirs "in which case Baconsfield would become commercial or residential property or property wherein no part of the public would have the enjoyment of the property . . ." (R. 60). Thus, the city was taking affirmative action, in the name of "the public interest," to preserve a park for "part of the public"—the white part. Assuming that the city was faced with a hard choice between no park at all and one for whites only, it takes a weird construction of the Fourteenth Amendment to say a subdivision of the state can opt for the latter.

The city had several alternatives consistent with the Fourteenth Amendment and in harmony with the interests of its white as well as Negro citizens. It could have resisted the board's petition with a powerful argument that destruction of its title by the Superior Court for purposes of enforcing segregation would violate the Fourteenth Amendment under the rule established in *Shelley* v. *Kraemer,* 334 U. S. 1. The city also should have urged that the racial limitation in Bacon's will must fall for its inconsistency with other provisions of the will manifesting Bacon's intent that the city never surrender control of Baconsfield.

Bacon had described the city's interest in the property as comprehending:

> all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind.... (R. 19).

The property was "under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of...." (R. 19). The will went on to say:

> ... I further specifically provide and direct that the said trustees hereinbefore named and their successors shall not have power or authority to sell or otherwise alienate or dispose of the tract of land thus described, bounded and platted or any part thereof during the continuance of said trust or trusts or at any other time, under any circumstances and upon any account whatsoever, and all such power to make such sale or alienation is hereby expressly denied to them, and to all others (R. 22).

By resigning the city ignored Bacon's intent. Had the city resisted the Board's petition in an attempt to retain the property, the court would have been much more likely to choose to follow Bacon's language concerning ownership rather than that concerning racial limitation. (See Argument III, *infra*). In a recent Texas case the court held that the intent of the donor of Rice University to maintain a first-class educational institution, which could no longer be accomplished without foundation grants stipulating nondiscrimination, outweighed the intent to exclude Negroes. *Rice University* v. *Carr,* 9 Race Rel. L. Rep. 613 (D. C. Harris County 1964), appeal dismissed, No. 14,472 (Tex. Civ. App. 1965). Cf. *Guillory* v. *Administrators of Tulane University,* 212 F. Supp. 674, 687 (E. D. La. 1962). Moreover, in an analogous situation, the Georgia Supreme Court

allowed Emory University to admit Negroes without forfeiting tax exemption because the statute conditioning university tax exemption on the maintenance of segregation was construed to conflict with another clause of the same statute. *Emory University* v. *Nash,* 218 Ga. 317, 127 S. E. 2d 798 (1962). There was, therefore, reason to believe that the argument here suggested might have been well received by the State Supreme Court.

Spurning the opportunity to contest the suit and preserve Baconsfield for all of its constituency, the city presented its resignation to the Superior Court. If one accepts respondents' notion that the Superior Court had no choice but to relieve the unwilling trustee of the burden of office (see Brief in Opposition, p. 12), the city is solely responsible for turning a piece of public property over to private persons for the purpose of maintaining racial segregation.

There are many ways of manipulating property interests so that official discrimination can be continued under the guise of private discrimination, but they are all fruitless because the Fourteenth Amendment is notably intolerant of technical evasions. The most common method is to lease public property to private interests, but it is now well settled that the private lessee is governed by the constitutional standards limiting the state, if the state retains any significant involvement or control. See *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715; *Turner* v. *Memphis,* 369 U. S. 350; *Derrington* v. *Plummer,* 240 F. 2d 922 (5th Cir. 1956), cert. denied *sub nom. Casey* v. *Plummer,* 353 U. S. 924. Where substantial state involvement or control remains it is, of course, immaterial whether the property was conveyed for the purpose of perpetuating discrimination. Where there is such a purpose, the Fourteenth Amendment restricts the actions of the lessee whether or not the state

continues to be involved. See *Tate* v. *Department of Conservation and Development*, 231 F. 2d 615 (4th Cir. 1956); *Derrington* v. *Plummer, supra*, 240 F. 2d at 925. Similar considerations govern the applicability of the Fourteenth Amendment when public land is sold to private interests. The sale does not alter the constitutional obligations of the owner if significant control is retained by the state, see *Hampton* v. *Jacksonville*, 304 F. 2d 320 (5th Cir. 1962), cert. denied *sub nom. Ghioto* v. *Hampton*, 371 U. S. 911; *Smith* v. *Holiday Inns of America, Inc.*, 336 F. 2d 630 (6th Cir. 1964), or if the purpose was to continue discrimination, see *Hampton* v. *Jacksonville, supra*, 304 F. 2d at 331 (Jones, J., concurring). *A fortiori*, the state may not give land away to private persons for the purpose of perpetuating racial segregation. Cf. *Griffin* v. *School Board*, 377 U. S. 218, 231. The City of Macon therefore could not transfer property without consideration for the explicit purpose of promoting segregation and in the knowledge that segregation would be required.

III.

In Deciding an Issue of State Law, the Courts of Georgia Accorded the Racial Limitation in Bacon's Will a Deference Inconsistent With Supreme Federal Law.

No one branch of government can claim full credit for keeping Baconsfield white. Each made a unique contribution, the Superior Court of Bibb County no less than the others. It issued the order accepting the city's resignation and appointing three new trustees.[7]

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[7] In the second *Girard College Case*, the Supreme Court of Pennsylvania approved the appointment of private trustees to continue discriminatory operation. *Estate of Stephen Girard*, 391 Pa. 434, 138 A. 2d 844 (1958), appeal dismissed and cert. denied, 357 U. S. 570. Denial of review by this Court was not a ruling on the merits, and petitioners submit that the Pennsylvania Supreme Court ruled erroneously.

If the principle of *Shelley* v. *Kraemer*, 334 U. S. 1, is not to be strictly limited to restrictive covenants, the Superior Court's order was invalid. Accepting the arguments of the board and the city, the court replaced the city in order that Baconsfield might continue to be operated on a segregated basis in accordance with the terms of Bacon's will. This is, if anything is, enforcement by the judiciary of racial separation and wholly inconsistent with the equal protection of the laws.

The Superior Court held "it is proper that the court accept the resignation and appoint private trustees who can carry out the purpose and intent of the testator as set forth in the will" (*supra*, p. 6, n. 2). Under *Shelley* v. *Kraemer*, *supra*, the Superior Court's enforcement of the racial limitation would violate the Constitution even if it were unequivocally clear that Bacon intended to limit use of his park to white persons at the expense of having control of the park transferred to private interests. However, that issue is not necessarily presented by this record, because Bacon's will manifested contradictory desires. If Bacon intended that the park be restricted to white persons, it is no less clear that he intended Baconsfield to be forever owned by the City of Macon. The will provisions quoted on pages 16, 17, *supra*, establish this beyond question. The decision in *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230, renders impossible the present effectuation of both desires. What the Superior Court did was to ignore Bacon's intention as to ownership and implement the intention as to racial selection.

Petitioners submit that the courts of Georgia were not at liberty to make such a choice. Bacon wanted a park for white persons; he wanted the city as trustee. He offered no intimation as to which desire should prevail in case of

conflict. Faced with the necessity of making the choice that Bacon had never contemplated, the Superior Court chose segregation, just as the city had done. The court's action is no more compatible with the Fourteenth Amendment. No branch of government can require, encourage or participate in a policy of racial segregation, *Cooper* v. *Aaron*, 358 U. S. 1, 16-17, and certainly a court cannot decide to enforce a will provision mandating segregation as against another provision that is in harmony with the Constitution.

The court's decision cannot be passed off as the resolution of a will construction problem under traditional rules of state law. Overriding federal law steps in and says that any term of the will that blatantly violated the Fourteenth Amendment is not entitled to consideration by the state court. Had the Georgia courts followed this principle, they would have had no choice but to implement the provision requiring perpetual ownership by the city.

Petitioners requested that the court reject the resignation and compel the city to fulfill its obligation under the will and its constitutional obligation to accord equal treatment to all citizens (R. 63). By rejecting this request, the courts of Georgia acted in defiance of the Constitution.

IV.

Baconsfield Is a Public Facility From Which Negroes Cannot Be Excluded.

Respondents have argued that "characterization of Baconsfield as a 'public' park begs the question" (Brief in Opposition, p. 7), but calling it public has substantive as well as semantic significance. It was created pursuant to Ga. Code §69-504, which bears the heading "Gifts for public parks or pleasure grounds." The statute describes the lands conveyed as "dedicated in perpetuity to the public use as a park, pleasure ground or for other public purpose." In every conceivable respect but one Baconsfield is and has been a public park. Until this litigation it was owned by the city and operated under the management of an appointed board of managers. The city and board also owned and administered the separate trust fund set aside by Bacon for maintenance of the park (R. 22-25). The city, through its board, had "complete and unrestricted control and management of the said property with power to make all needful regulations for the preservation and improvement" of the park (R. 3). Ga. Code §69-505 authorized the city "to improve, embellish, and ornament the land so granted as a public park," and so far as the record shows, Baconsfield's appearance is like that of any other public park. The great majority of the public are allowed to go on the premises of this large,[8] open tract of land at will and without charge.

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[8] Baconsfield's area does not appear in the record, but its dimensions as set forth in the legal description are very large. The irregular eastern boundary is approximately 4155 feet, the northern boundary is 1662 feet, the western and southern boundaries at least 3397 and 437 feet, respectively (R. 17).

The only difference between Baconsfield and any other public park is the exclusion of Negroes. But that does not differentiate it from other public parks in Georgia, where the policy of the state, as expressed in §69-504 and as manifested by the actions of all state agencies in this suit, has been to have all public parks exclude one race or the other. Even after the decisions outlawing racial segregation in public schools and other public facilities, e.g., *Brown* v. *Board of Education,* 347 U. S. 483; *Muir* v. *Louisville Park Theatrical Ass'n.,* 347 U. S. 971; *New Orleans City Park Improve. Ass'n* v. *Detiege,* 358 U. S. 54; *Watson* v. *Memphis,* 373 U. S. 526, several Georgia communities have been guilty of requiring segregation in public recreational facilities or actually operating segregated facilities, see, e.g., *Holmes* v. *City of Atlanta,* 350 U. S. 879; *Anderson* v. *Albany,* 321 F. 2d 649 (5th Cir. 1963); *Law* v. *Jekyll Island State Park Authority,* C. A. No. 8579 (N. D. Ga., July 27, 1964); cf. *Wright* v. *Georgia,* 373 U. S. 284.[9] This Court's rulings having rendered unlawful the continued operation of public parks on a segregated basis, it is an anomaly indeed if this park can be singled out and allowed to segregate.

Irrespective of state ownership, past or present, it is highly questionable whether any open park land available for use by a majority of the people can be segregated. By close analogy, this Court's decision in *Marsh* v. *Alabama,* 326 U. S. 501, indicates that even a privately owned park which is open to most of the public must admit all of the public. In *Marsh* the court emphasized the similarity between the company town of Chicasaw and any other town,

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[9] In 1956, in an obvious response to *Holmes* v. *Atlanta,* 350 U. S. 879, Georgia enacted a law allowing public parks to be sold, leased or otherwise disposed of without regard to whether the property was unsuitable or inadequate for park purposes. Act No. 20, Ga. Laws 1956, Vol. I, p. 22.

and refused to accept private ownership as a reason for ignoring the Fourteenth Amendment:

> ... Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.... Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.... 326 U. S. at 506.

Petitioners submit that recreational parks are also "built and operated primarily to benefit the public" and "their operation is essentially a public function."[10] The Legislature of Georgia in 1905 viewed it a public function to encourage the establishment of public parks, see Ga. Code §69-504, and present Georgia law authorizes municipalities to set aside existing public property or acquire new property for use as parks, playgrounds, and recreation centers, see Ga. Gode Ann. §§69-601 to 69-616. Thus the reasoning in *Marsh* v. *Alabama* fully supports the contention that irrespective of ownership, a public park cannot be operated for white persons only. To hold otherwise would be to say that the validity of an absolute prohibition on the distribution of literature in Baconsfield depends on who holds legal title.

The overriding significance of function, as opposed to ownership, is also demonstrated by the decisions of the Fourth Circuit in *Simkins* v. *Moses H. Cone Memorial*

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[10] See *Lombard* v. *Louisiana*, 373 U. S. 267, 274 (concurring opinion); *Bell* v. *Maryland*, 378 U. S. 226, 286 (concurring opinion).

Hospital, 323 F. 2d 959 (4th Cir. 1963), cert. denied, 376 U. S. 938, and *Eaton* v. *Grubbs*, 329 F. 2d 710 (4th Cir. 1964), which held that medical facilities owned and operated by private groups under comprehensive state plans are subject to the nondiscrimination requirements of the Fourteenth Amendment. These decisions clearly apply to those private facilities which the state takes into account when deciding whether to provide other facilities. Baconsfield is such a facility, for the City of Macon stated its concern, in the resolution authorizing resignation, that Baconsfield not be lost to public use (R. 60).

Baconsfield is not a hospital with necessary limitations on entry and use. It is open park land, inherently a part of the public life of the community. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U. S. 496, 515 (concurring opinion).

The considerations discussed above support the conclusion that Baconsfield would have to be opened to all of the public even if it had never been owned and managed by the city. Petitioner's case is strengthened by the history of Baconsfield's ownership and operation by the city and the transfer to private trustees for the purpose of allowing discrimination.

V.

The Charitable Trust in This Case Is so Much the Creature of the State and so Related to an Inherently Public Aspect of Community Life as to Be Governed by the Fourteenth Amendment Prohibition of Racial Discrimination.

The State of Georgia is in so many ways responsible for the creation of Baconsfield and its continuous operation on a segregated basis that it is difficult to isolate the various strands of doctrine supporting petitioners' constitutional position. Focus has centered on the statute enacted in 1905 which puts this case well within the rule of *Peterson* v. *Greenville* and *Robinson* v. *Florida*. Emphasis has been placed upon the concerted action of state agencies toward the single goal of assuring segregation in Baconsfield. These factors make *Shelley* v. *Kraemer* applicable as well as those cases forbidding a state institution to transfer public property for the purpose of continuing racial discrimination. It has been argued that the courts of Georgia violated the Fourteenth Amendment by giving weight and preference to an invalid racial limitation over another, inconsistent clause in Bacon's will. And the fourth argument was that Baconsfield is inherently a public facility like any other public park, which under the doctrine of *Marsh* v. *Alabama* and the recent hospital cases cannot discriminate even when operated by private trustees.

Those arguments are sound, but there is another concerning the unique nature of the charitable trust that should be considered by the Court. A charitable trust is so much a creature of the state that it ought to be subjected to particularly close scrutiny when it calls for discrimination against persons according to race or color.

The testamentary charitable trust takes effect only when the state's judicial branch upholds its validity and sanctions its enforcement. If in the eyes of the state the trust does not serve a permissible public purpose, it will not be enforced. The very fact that the Baconsfield trust was approved by the state demonstrates, apart from the significance of Ga. Code §69-504, that the State of Georgia approves the establishment of public institutions for the exclusive benefit of white persons. If the State of Georgia, acting through its legislature or courts, determined that the operation of public facilities for one race only was inconsistent with public policy, Baconsfield would not exist in its present form.

The usual purposes of charitable trusts such as support of educational and religious institutions, aid for the poor, and other goals generally accepted as charitable are approved by the state because dollars given by the charitable donor fulfill needs that, except for religion, would otherwise be a burden of the state. It is incongruous in the extreme that the state should protect and enforce charitable institutions serving the needs of the state but not governed by essential principles of fairness which the state itself is bound by the Constitution to observe.

Georgia, like other states, has an elaborate legal structure encouraging and sanctioning the creation of charitable trusts. Statutes provide for the enforcement of charitable trusts in equity, see Ga. Code Ann. §108-201, continuous supervision by the courts, §108-204, and effectuation of the testator's charitable intent under the *cy pres* doctrine, §108-202. Charitable trusts are looked upon with special favor, see, e.g., *Simpson* v. *Anderson,* 220 Ga. 155, 137 S. E. 2d 638 (1964); *Goree* v. *Georgia Industrial Home,* 187 Ga. 368, 200 S. E. 684 (1938).

The testamentary charitable trust begins with state approval by the court of equity. The trustees are bound to follow the terms of the trust, and since the beneficiaries of charitable trusts by definition constitute a rather broad class of individuals, the trustees may be challenged not only by members of the favored group, but by the state attorney general or, in Georgia, the solicitor general of the circuit in which the trust corpus lies. See Ga. Code §108-212.

Having encouraged the creation of charitable trusts and provided a system of law, both legislative and judicial, for their effectuation, the state does not end its aid to charitable trusts. It grants them among other things exemption from taxation. Georgia's constitution and statutes are no exception from the general rule. See Ga. Const. 1945, Art. 7, Sec. 1, Par. 4; Ga. Code §2-5404; Ga. Code §92-201. It happens that since 1918 Georgia has conditioned tax exemption on the maintenance of racial restrictions in the operation of charitable trusts: "all endowments to institutions established for white people, shall be limited to white people, and all endowments to institutions established for colored people, shall be limited to colored people;" Editorial note, Ga. Const. 1877, Art. 7, Sec. 2, Par. 1, Ga. Code Ann. §2-5002. Tax exemption is a boon to the testator setting up a charitable trust. It assures that the resources he leaves will not be siphoned off into the state treasury but will be devoted exclusively to his purposes. The state exempts charitable trust assets from taxation because the trust is doing the work of the state; for the state to tax them would be like removing money from one pocket and placing it into another.

Probably even more desirable to the testator considering the establishment of a charitable trust is that most valuable incident, perpetual existence. Private trusts are restricted

in duration by the rule against perpetuities, see, Ga. Code §85-707, but charitable trusts are not, see *Regents of University System* v. *Trust Co. of Georgia,* 186 Ga. 498, 512, 198 S. E. 345 (1938); *Murphy* v. *Johnston,* 190 Ga. 23, 8 S. E. 2d 23 (1940); *Pace* v. *Dukes,* 205 Ga. 835, 55 S. E. 2d 367 (1949). See also Ga. Code §69-504. The state allows dead hand control perpetually on the theory that the public will perpetually benefit from a charitable trust. A man has some right to exercise his prejudices in the use of his private property during his life, and to dispose of his property by will, making arbitrary choices about its recipients and uses. But no man has the right to control his property through eternity. The state sets temporal limits on testamentary encumbrances, and in the exceptional situation of the charitable trust it exercises close supervision. In this case Georgia has not only given Bacon's trust perpetual existence, but has exercised its broad powers to assure the maintenance of segregation to the end of time.

Another advantage conferred by Georgia on charitable trusts is immunity from tort liability in certain situations. An institution's "charitable assets" cannot be recovered for the negligence of employees. *Morehouse College* v. *Russell,* 219 Ga. 717, 135 S. E. 2d 432 (1964); *id.,* 109 Ga. App. 301, 136 S. E. 2d 179 (1964); *Cox* v. *De Jarnette,* 104 Ga. App. 664, 123 S. E. 2d 16 (1961). Georgia has a comparable doctrine of tort immunity for municipalities, Ga. Code §69-301, which applies to the operation of public parks, *Stubbs* v. *City of Macon,* 78 Ga. App. 237, 50 S. E. 2d 866 (1948); *Jones* v. *City of Atlanta,* 35 App. 376, 133 S. E. 521 (Ga. Ct. App. 1926).

The features of state involvement in the creation of charitable trusts are so manifold that such trusts are to a significant degree creatures of the state and the special

beneficiaries of the state even though they begin with a private decision and with privately owned property. See Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard,* 66 Yale L. J. 979, 1002-09 (1957). Without regard to whether other types of charitable trusts should, because of these state contacts, be subject to the Fourteenth Amendment, the Baconsfield trust has features which require that it be subject to the Amendment. The Baconsfield trust receives the continued support, recognition, and sanction of state law on the theory that a park is a benefit to the community and serves the community. It is a trust totally involved with the public life of the community, the intended domain of the Fourteenth Amendment, and is to some degree distinct from charitable trusts which because of the nature of their enterprises necessarily offer direct benefits to only small portions of the community. Baconsfield was established so as to offer its beneficial use directly to every member of the public, except Negroes. It flies in the face of the Fourteenth Amendment's prohibition against the exclusion of persons from the benefits and protections of state law on the basis of race. This is all the more evident where, as here, the initial decision to discriminate racially was encouraged by an explicitly racial state statute. An overall appraisal of the nature of state involvement in the trust, the nature and function of the trust in the community, "the benefits mutually conferred" by the testator and the state, and the role of the state legislature and state judiciary in establishing and continuing the park on a segregated basis, leads irresistibly to the conclusion that this case involves "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 724.

CONCLUSION

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
CHARLES STEPHEN RALSTON
FRANK H. HEFFRON
10 Columbus Circle
New York, New York 10019

DONALD L. HOLLOWELL
WILLIAM H. ALEXANDER
HOWARD MOORE, JR.
859½ Hunter Street, N.W.
Atlanta, Georgia 30314

Attorneys for Petitioners